

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

JUAN M. MONTENEGRO,

Plaintiff,

v.

WARDEN J. SULLIVAN,

Defendant.

Case No. 1:20-cv-00847-EPG (PC)

FINDINGS AND RECOMMENDATIONS,  
RECOMMENDING THAT THIS ACTION  
BE DISMISSED, WITH PREJUDICE, FOR  
FAILURE TO STATE A CLAIM,  
FAILURE TO PROSECUTE, AND  
FAILURE TO COMPLY WITH A COURT  
ORDER

(ECF NOS. 1 & 7)

OBJECTIONS, IF ANY, DUE WITHIN  
FOURTEEN DAYS

ORDER DIRECTING CLERK TO ASSIGN  
DISTRICT JUDGE

**I. BACKGROUND**

Juan M. Montenegro (“Plaintiff”) is a state prisoner proceeding *pro se* and *in forma pauperis* in this civil rights action filed pursuant to 42 U.S.C. § 1983.

Plaintiff filed the complaint commencing this action on June 15, 2020. (ECF No. 1). It appears that Plaintiff originally brought his allegations in a habeas case, but filed this § 1983 case after the undersigned issued findings and recommendations, recommending that Plaintiff’s habeas case be dismissed because it should have been brought as a § 1983 case. (E.D. Cal. Case No. 1:20-cv-00684, ECF No. 5).

On June 24, 2020, the Court screened Plaintiff’s complaint and found that it failed to state a claim. (ECF No. 7). The Court gave Plaintiff thirty days from the date of service of the

1 order to file an amended complaint or to notify the Court that he wants to stand on his  
 2 complaint. (Id. at 9). The Court warned Plaintiff that “[f]ailure to comply with this order may  
 3 result in the dismissal of this action.” (Id.).

4 The thirty-day period has expired, and Plaintiff has not filed an amended complaint or  
 5 otherwise responded to the Court’s order. Accordingly, for the reasons described below, the  
 6 Court will recommend that Plaintiff’s case be dismissed for failure to state a claim. The Court  
 7 will also recommend that Plaintiff’s case be dismissed for failure to comply with a court order  
 8 and failure to prosecute.

## 9 II. SCREENING REQUIREMENT

10 The Court is required to screen complaints brought by prisoners seeking relief against a  
 11 governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a).  
 12 The Court must dismiss a complaint or portion thereof if the prisoner has raised claims that are  
 13 legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or  
 14 that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C.  
 15 § 1915A(b)(1), (2). As Plaintiff is proceeding *in forma pauperis* (ECF No. 6), the Court may  
 16 also screen the complaint under 28 U.S.C. § 1915. “Notwithstanding any filing fee, or any  
 17 portion thereof, that may have been paid, the court shall dismiss the case at any time if the court  
 18 determines that the action or appeal fails to state a claim upon which relief may be granted.”  
 19 28 U.S.C. § 1915(e)(2)(B)(ii).

20 A complaint is required to contain “a short and plain statement of the claim showing  
 21 that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are  
 22 not required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere  
 23 conclusory statements, do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Bell  
 24 Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)). A plaintiff must set forth “sufficient  
 25 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” Id.  
 26 (quoting Twombly, 550 U.S. at 570). The mere possibility of misconduct falls short of meeting  
 27 this plausibility standard. Id. at 679. While a plaintiff’s allegations are taken as true, courts  
 28 “are not required to indulge unwarranted inferences.” Doe I v. Wal-Mart Stores, Inc., 572 F.3d

677, 681 (9th Cir. 2009) (citation and internal quotation marks omitted). Additionally, a plaintiff's legal conclusions are not accepted as true. Iqbal, 556 U.S. at 678.

Pleadings of *pro se* plaintiffs "must be held to less stringent standards than formal pleadings drafted by lawyers." Hebbe v. Pliler, 627 F.3d 338, 342 (9th Cir. 2010) (holding that *pro se* complaints should continue to be liberally construed after Iqbal).

### III. SUMMARY OF PLAINTIFF'S COMPLAINT

Plaintiff alleges the following in his complaint:

Plaintiff is unable to get proper healthcare for his disabilities. Plaintiff has raised several challengeable issues on his 602 that the California Department of Corrections and Rehabilitation ("CDCR") refuses to address. Plaintiff suffers from several illnesses such as hearing loss, inability to sit or stand for long periods of time, difficulty seeing, post-traumatic stress disorder ("PTSD"), depression, and paranoia.

Plaintiff's vision is deteriorating due to lack of care. His hearing is getting worse because the CDCR will not refer him to a hearing specialist. His depression, PTSD, and paranoia are getting worse due to the environment he has to live in.

Plaintiff requests monetary compensation and to be transferred to a medical facility. Plaintiff also seeks to be released so that he can get better healthcare for his disabilities.

Plaintiff attached approximately ninety pages of exhibits to his complaint.

### IV. ANALYSIS OF PLAINTIFF'S CLAIM

#### A. Section 1983

The Civil Rights Act under which this action was filed provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

42 U.S.C. § 1983. "[Section] 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" Graham v. Connor,

490 U.S. 386, 393-94 (1989) (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)); see also Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 618 (1979); Hall v. City of Los Angeles, 697 F.3d 1059, 1068 (9th Cir. 2012); Crowley v. Nevada, 678 F.3d 730, 734 (9th Cir. 2012); Anderson v. Warner, 451 F.3d 1063, 1067 (9th Cir. 2006).

To state a claim under section 1983, a plaintiff must allege that (1) the defendant acted under color of state law, and (2) the defendant deprived him of rights secured by the Constitution or federal law. Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006); see also Marsh v. Cnty. of San Diego, 680 F.3d 1148, 1158 (9th Cir. 2012) (discussing “under color of state law”). A person deprives another of a constitutional right, “within the meaning of § 1983, ‘if he does an affirmative act, participates in another’s affirmative act, or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made.’” Preschooler II v. Clark Cnty. Sch. Bd. of Trs., 479 F.3d 1175, 1183 (9th Cir. 2007) (quoting Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978)). “The requisite causal connection may be established when an official sets in motion a ‘series of acts by others which the actor knows or reasonably should know would cause others to inflict’ constitutional harms.” Preschooler II, 479 F.3d at 1183 (quoting Johnson, 588 F.2d at 743). This standard of causation “closely resembles the standard ‘foreseeability’ formulation of proximate cause.” Arnold v. Int’l Bus. Mach. Corp., 637 F.2d 1350, 1355 (9th Cir. 1981); see also Harper v. City of Los Angeles, 533 F.3d 1010, 1026 (9th Cir. 2008).

A plaintiff must demonstrate that each named defendant personally participated in the deprivation of his rights. Iqbal, 556 U.S. at 676-77. In other words, there must be an actual connection or link between the actions of the defendants and the deprivation alleged to have been suffered by the plaintiff. See Monell v. Dep’t of Soc. Servs. of City of N.Y., 436 U.S. 658, 691, 695 (1978).

Supervisory personnel are not liable under section 1983 for the actions of their employees under a theory of *respondeat superior* and, therefore, when a named defendant holds a supervisory position, the causal link between him and the claimed constitutional violation must be specifically alleged. Iqbal, 556 U.S. at 676-77; Fayle v. Stapley, 607 F.2d

858, 862 (9th Cir. 1979); Mosher v. Saalfeld, 589 F.2d 438, 441 (9th Cir. 1978). To state a claim for relief under section 1983 based on a theory of supervisory liability, Plaintiff must allege some facts that would support a claim that the supervisory defendants either: personally participated in the alleged deprivation of constitutional rights; knew of the violations and failed to act to prevent them; or promulgated or “implement[ed] a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation.” Hansen v. Black, 885 F.2d 642, 646 (9th Cir. 1989) (citations and internal quotation marks omitted); Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989).

For instance, a supervisor may be liable for his or her “own culpable action or inaction in the training, supervision, or control of his subordinates,” “his [or her] acquiescence in the constitutional deprivations of which the complaint is made,” or “conduct that showed a reckless or callous indifference to the rights of others.” Larez v. City of Los Angeles, 946 F.2d 630, 646 (9th Cir. 1991) (citations, internal quotation marks, and brackets omitted).

Requests for prospective relief are limited by 18 U.S.C. § 3626(a)(1)(A) of the Prison Litigation Reform Act, which requires that the Court find that the “relief [sought] is narrowly drawn, extends no further than necessary to correct the violation of the Federal Right, and is the least intrusive means necessary to correct the violation of the Federal Right.” As to requests for a release order, the Prison Litigation Reform Act provides:

**(3) Prisoner release order.--(A)** In any civil action with respect to prison conditions, no court shall enter a prisoner release order unless--

**(i)** a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order; and

**(ii)** the defendant has had a reasonable amount of time to comply with the previous court orders.

**(B)** In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court in accordance with section 2284 of title 28, if the requirements of subparagraph (E) have been met.

**(C)** A party seeking a prisoner release order in Federal court shall file with any request for such relief, a request for a three-judge court and materials sufficient to demonstrate that the requirements of subparagraph

(A) have been met.

(D) If the requirements under subparagraph (A) have been met, a Federal judge before whom a civil action with respect to prison conditions is pending who believes that a prison release order should be considered may sua sponte request the convening of a three-judge court to determine whether a prisoner release order should be entered.

(E) The three-judge court shall enter a prisoner release order only if the court finds by clear and convincing evidence that--

(i) crowding is the primary cause of the violation of a Federal right; and

(ii) no other relief will remedy the violation of the Federal right.

(F) Any State or local official including a legislator or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order shall have standing to oppose the imposition or continuation in effect of such relief and to seek termination of such relief, and shall have the right to intervene in any proceeding relating to such relief.

18 U.S.C. § 3626(a)(3).

**B. Deliberate Indifference to Serious Medical Needs in Violation of the Eighth Amendment**

“[T]o maintain an Eighth Amendment claim based on prison medical treatment, an inmate must show ‘deliberate indifference to serious medical needs.’” Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (quoting Estelle v. Gamble, 429 U.S. 97, 104 (1976)). This requires Plaintiff to show (1) “a ‘serious medical need’ by demonstrating that ‘failure to treat a prisoner’s condition could result in further significant injury or the unnecessary and wanton infliction of pain,’” and (2) that “the defendant’s response to the need was deliberately indifferent.” Id. (quoting McGuckin v. Smith, 974 F.2d 1050, 1059-60 (9th Cir. 1992) (citation and internal quotations marks omitted), overruled on other grounds by WMX Technologies v. Miller, 104 F.3d 1133 (9th Cir. 1997) (*en banc*)).

Deliberate indifference is established only where the defendant *subjectively* “knows of and disregards an *excessive risk* to inmate health and safety.” Toguchi v. Chung, 391 F.3d 1051, 1057 (9th Cir. 2004) (emphasis added) (citation and internal quotation marks omitted).

Deliberate indifference can be established “by showing (a) a purposeful act or failure to respond to a prisoner’s pain or possible medical need and (b) harm caused by the indifference.” Jett, 439 F.3d at 1096 (citation omitted). Civil recklessness (failure “to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known”) is insufficient to establish an Eighth Amendment violation. Farmer v. Brennan, 511 U.S. 825, 836-37 & n.5 (1994) (citations omitted).

A difference of opinion between an inmate and prison medical personnel—or between medical professionals—regarding appropriate medical diagnosis and treatment is not enough to establish a deliberate indifference claim. Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989); Toguchi v. Chung, 391 F.3d 1051, 1058 (9th Cir. 2004). Additionally, “a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.” Estelle, 429 U.S. at 106. To establish a difference of opinion rising to the level of deliberate indifference, a “plaintiff must show that the course of treatment the doctors chose was medically unacceptable under the circumstances.” Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996).

The only defendant named in Plaintiff’s complaint is Warden Sullivan. However, Plaintiff’s complaint makes no allegations regarding defendant Sullivan’s conduct. Additionally, Plaintiff has not made any allegations that defendant Sullivan promulgated a policy that led to the alleged lack of medical care, or that defendant Sullivan knew that Plaintiff was receiving inadequate medical care but failed to correct the problem. Accordingly, Plaintiff has failed to state a claim against defendant Sullivan.

As to Plaintiff’s request for a release order, Plaintiff has failed to comply with the procedures laid out in 18 U.S.C. § 3626(a)(3).

The Court previously provided Plaintiff with relevant legal standards and leave to amend his complaint to cure the deficiencies identified above. (ECF No. 7). However, the deadline for Plaintiff to amend his complaint has passed and Plaintiff has not filed an amended complaint.



Accordingly, the Court will recommend that this action be dismissed for failure to state a claim.

**V. FAILURE TO PROSECUTE AND COMPLY**

“In determining whether to dismiss a[n] [action] for failure to prosecute or failure to comply with a court order, the Court must weigh the following factors: (1) the public’s interest in expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of prejudice to defendants/respondents; (4) the availability of less drastic alternatives; and (5) the public policy favoring disposition of cases on their merits.” Pagtalunan v. Galaza, 291 F.3d 639, 642 (9th Cir. 2002) (citing Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992)).

“The public’s interest in expeditious resolution of litigation always favors dismissal.” Id. (quoting Yourish v. California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)). Accordingly, this factor weighs in favor of dismissal.

As to the Court’s need to manage its docket, “[t]he trial judge is in the best position to determine whether the delay in a particular case interferes with docket management and the public interest.... It is incumbent upon the Court to manage its docket without being subject to routine noncompliance of litigants....” Pagtalunan, 291 at 639. Plaintiff has failed to respond to the Court’s screening order. This failure to respond is delaying the case and interfering with docket management. Therefore, the second factor weighs in favor of dismissal.

Turning to the risk of prejudice, “pendency of a lawsuit is not sufficiently prejudicial in and of itself to warrant dismissal.” Id. at 642 (citing Yourish, 191 F.3d at 991). However, “delay inherently increases the risk that witnesses’ memories will fade and evidence will become stale,” id. at 643, and it is Plaintiff’s failure to comply with a court order and to prosecute this case that is causing delay. Therefore, the third factor weighs in favor of dismissal.

As for the availability of lesser sanctions, at this stage in the proceedings there is little available to the Court which would constitute a satisfactory lesser sanction while protecting the Court from further unnecessary expenditure of its scarce resources. Considering Plaintiff’s incarceration and *in forma pauperis* status, monetary sanctions are of little use. And, given the



stage of these proceedings, the preclusion of evidence or witnesses is not available.

Finally, because public policy favors disposition on the merits, this factor weighs against dismissal. Id.

After weighing the factors, the Court finds that dismissal with prejudice is appropriate.

## **VI. RECOMMENDATIONS AND ORDER**

Based on the foregoing, the Court HEREBY RECOMMENDS that:

1. This action be dismissed, with prejudice, for failure to state a claim, failure to prosecute, and failure to comply with a court order; and
2. The Clerk of Court be directed to close this case.

These findings and recommendations will be submitted to the United States district judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within fourteen (14) days after being served with these findings and recommendations, Plaintiff may file written objections with the Court. The document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” Plaintiff is advised that failure to file objections within the specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 838-39 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

Additionally, IT IS ORDERED that the Clerk of Court is directed to assign a district judge to this case.

IT IS SO ORDERED.

Dated: August 14, 2020

/s/ Eric P. Gray  
UNITED STATES MAGISTRATE JUDGE